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Supreme Court, U.S.
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No. 04-1196

IN THE

Supreme Court of the United States

WILLIAM H. KELLEY,

Petitioner,

v.

SECRETARY OF THE FLORIDA
DEPARTMENT OF CORRECTIONS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION TO CERT

1. The petition demonstrated that the prosecution in petitioner's capital trial failed to disclose, and indeed affirmatively suppressed, evidence that petitioner could have used to impeach the state's key witness (John Sweet, who claimed to have hired petitioner Kelley to commit the murder in question) on central aspects of that witness's testimony in ways that would have created a significant likelihood of a different outcome. That evidence included vital information bearing on what the key witness thought he had "to gain by his testimony," as the jury asked the court after reaching an impasse, Pet. App. 130a-31a — information that therefore came within not only the general requirements of *Brady* v. *Maryland,* 373 U.S. 83 (1963), but also the specific rule of *Giglio* v. *United States,* 405 U.S. 150 (1972), that the jury is "entitled to know of" evidence bearing on "any understanding or agreement as to a future prosecution." *Id.* at 154-55.

2. Respondent ("the state") persists before this Court in the very obfuscation that it practiced before the jury that convicted petitioner and sentenced him to death and that the Eleventh Circuit echoed in the decision below: sorting through all the complex facts, the state contends, is wildly difficult, but what ultimately counts is that the jury heard defense counsel discredit Sweet as a murderer and a liar. Pet. App. 79a. This Court deserves more trustworthy advocacy, for, in truth, the jury was deliberately deceived with the aid of a flagrant violation of *Brady*, and it is a deception the state has the temerity to continue here.

3. Years before Sweet had agreed to testify against petitioner Kelley, the State of Florida, having twice failed to convict Sweet of masterminding the murder, had given up the ghost: Sweet had been discharged from prosecution for that offense in 1971, Pet. App. 7a-8a, and the jury knew he had been given "immunity in Florida for the Maxcy case and for the perjury committed in his * * * two trials, and in Massachusetts for breaking and entering, hijacking, larceny,

arson, bribery, * * * and drug and prostitution offenses." *Id.* 183a. What the jury did *not* know was whether Sweet saw any of this immunity as a promised reward to induce him to testify against Kelley, against whom the state otherwise had no case.[1] Thus the jury, having reached an "impasse" after deliberating for seven hours and voting three times, *id.* 184a, returned to the courtroom to ask specifically whether he "had anything to gain by his testimony." *Ibid.*[2]

4. Both the circuit court and the state make light of the trial court's refusal to answer the jury's inquiry. And, by quoting back and forth from the closing arguments of the prosecution and the defense, the state leaves the impression that the jury was not misled and that, when prosecutor Pickard told the jury in his closing that "Sweet did not have to give the police Kelley in order to get immunity" and that his Massachusetts immunity "has *nothing to do* with * * * giving them Kelley on the Florida" murder, Resp. Br. 7 (emphasis added), he was only saying what the state post-conviction court later found to be the case with respect to why Massachusetts acted as it did. *Id.* 21. What the state artfully *deletes* from its excerpt of the prosecutor's argument to the jury is his flatly false statement that Sweet "*already had* his immunity from Massachusetts," Pet. App. 184a, when he offered to testify that the man he had hired to commit the Florida murder was William H. Kelley. This was no minor

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[1] The state, as respondent hastens to remind petitioner, Resp. Pet. 4, indeed suggested at Sweet's 1969 trial that the man who had signed "William Kelley" on a hotel register was one of the killers, although the state's concession that it had insufficient evidence to prosecute the petitioner until Sweet agreed in 1981 to testify against him, Pet. App. 201a, underscores the doubt that persists to this day over the true identity of whoever checked into that hotel back in 1966.

[2] The jury's question asked both specifically whether Kelley "received immunity in Florida * * * before he gave information on the Maxcy trial," and more generally whether he "had anything to gain by his testimony," Pet. App. 130a-31a; the breadth of the jury's question indicates that it was clearly interested in and inquiring about whether *anything*, including the Massachusetts immunity arrangement, had induced Sweet to testify.

mistake, coming as it did from the very prosecutor who attended the meeting of March 12, 1981, at which Sweet made that offer, exactly one day *before* Massachusetts finally granted him the full immunity he sought.

5. Aware that the question of Sweet's credibility would be a vital matter at trial, the prosecution knowingly suppressed the only two existing documents that could have been used to show prosecutor Pickard to be lying to the jury about the timing of the immunity deal, revealing as those documents did that Sweet did not get his Massachusetts immunity until *after* he had promised to testify against Kelley. *See* Pet. App. 182a. Nothing in the state's brief explains how suppressing the truth about this sequence of events can be said not to have undermined the integrity of this trial and of the jury's ultimate verdict under the materiality standards of *Brady* and its progeny.

6. Instead of addressing that crucial issue, the state subtly shifts the inquiry from what, if anything, *Sweet* expected to gain by incriminating Kelley to what ultimately motivated *Massachusetts* in its decision to immunize him — the matter on which the state post-conviction court opined. In so doing, the state here, just as in Kelley's trial, is playing the age-old trick of answering the wrong question because it has no answer to the right one, a trick we trust this Court will see through and one it will not permit to serve as the basis for an execution. *See* Resp. Br. 8, 19-22.

7. The court below went out of its way to label the district court's conclusions about the connection between Sweet's testimony and the Massachusetts grant of immunity "preposterous," Pet. App. 78a, relying not on what the district court expressly found but on what it surmised was in "the district court's mind," *ibid.*, which it thought badly confused,

see id. 77a,[3] and proceeded to make its own factual findings — to wit, that "what Sweet wanted for testifying against Kelly [was] Florida immunity," *id.* 77a; that the Massachusetts courts did not grant Sweet immunity because he was willing to testify against Kelley in Florida, *id.* 78a; and that Pickard did not lie to the jury in closing argument, *id.* 79a. Replying to the petition's demonstration that the circuit court had manifestly engaged in de novo factfinding rather than deferring to the district court's own findings of fact about what motivated whom, and had thereby defied this Court's holding in *Amadeo* v. *Zant,* 486 U.S. 214 (1988), respondent can argue only that the district court started the usurpation game when it upended the "relevant state court factual findings." Resp. Br. 22. But surely the rules that bind an Article III court when exercising appellate jurisdiction in habeas cases of this kind are not simply waived, tit for tat, when a lower federal court has allegedly exceeded its limits vis-à-vis the state judiciary, especially in a manner making no difference to the outcome of the case. In any event, it turns out that the district court here carefully observed those limits. It rendered no ruling at all on *why* the Massachusetts court immunized Sweet but made only the indisputable observation that the withheld material showed Sweet's Massachusetts deal to be "inextricably *connected* to Sweet's implication of Kelley in the murder of Maxcy." Pet. App. 129a-30a (emphasis added). The district judge showed all appropriate restraint in rendering his decision not on the basis of what *he* might speculate underlay the immunity deal, but on how the prosecutor's suppression and misrepresentation of the truth about the sequence and substance of those negotiations

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[3] It would be unfortunate indeed to ratify the court of appeals' decision to rely in this case on "its visceral knowledge regarding what *must* have motivated" the district judge, *cf. Edwards* v. *Aguillard*, 482 U.S. 578, 610 (1987) (Scalia, J., dissenting), rather than to evaluate the closely reasoned opinion that the judge actually authored.

deprived the jury of *its* opportunity to decide what actually happened.[4]

8. The Eleventh Circuit's studied inattention to the way in which remedying that deprivation might have changed the jury's verdict is explicable only if one recognizes this circuit as among the several that take a reductive approach to evidence not disclosed by the prosecution. These circuits hold that, even if the prosecution witness in question is indispensable to the state's case, once a witness has already been impeached, withheld evidence is merely "cumulative" if it would go to further impeach that witness. *See generally* Pet. 18-19. That the court below applied such a rule even while incanting the standard formulas, Pet. App. 67a, is clear from its analysis that, because defense counsel's reason for "wanting to exploit Sweet's immunity arrangements was to convince the jury that Sweet was a sullied witness," and because Sweet was "sullied" already, the exhibits in question would necessarily have been "at best, cumulative evidence," *id.* 82a — a conclusion the court reached without the slightest attempt to view the case as a whole.

9. The undisclosed evidence included as well the transcript of Sweet's own first trial for masterminding Maxcy's murder. The prosecution, in an internal 1981 memo, immediately recognized this transcript (of a recording the state falsely told Kelley did not exist, *see* Pet. 187a) as posing the primary problem for the state's entire case against Kelley. *See* Pet. 17 n.8. The reason was the transcript's revelation that, when Irene Maxcy, Sweet's lover and co-conspirator, goaded him — in a telephone conversation that she (falsely) assured him was not being overheard and recorded — to

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[4] It is a complete distraction for respondent to argue now that it was error for the district court to hold an evidentiary hearing. Although the question much exercises the respondent, *see* Resp. Br. 20-21, the propriety of the hearing is not material to the *Brady* question. In reaching its *Brady* decision, the district court adverted to information gleaned at the hearing only in passing, in a footnote that bolstered an independently supported conclusion. *See* Pet. App. 134a n.6.

frame someone like William Kelley in the murder of her husband, Sweet confided to her that he knew no "William Kelley." As the state's memorandum showed it recognized, *see ibid.*, a jury that might disbelieve Sweet's past assertion that he did not know a "William Kelley," if made only self-interestedly to police, could well believe it on learning that Sweet also denied knowing Kelley in a conspiratorial conversation Sweet thought was confidential — just as an audience that would dismiss as hypocrisy Macbeth's public protestation of fondness for Duncan (the man he is about to murder) pays rapt attention when Macbeth whispers his regret at the murder to his wife alone in their bedchamber. *Compare* MACBETH, act 1, sc. 4, *with id.*, act 2, sc. 1. And if the jury concluded that Sweet didn't even know Kelley at the time of the Maxcy murder, then, as the district court recognized, Pet. App. 132a-34a, and the petition stressed, Pet. 16-17, it would presumably have concluded that he was now lying about having hired Kelley to do the killing.

10. The court of appeals simply ignored the dramatic difference between the jury's likely reaction to the story Sweet told the police and its likely reaction to what he whispered in confidence to his murderous paramour, and could not see that making the transcript available "could have affected the outcome of Kelley's trial." *Ibid.* The state has conspicuously let this crucial point drop, thus seemingly conceding that its concealment of this conversation could well have sealed petitioner's fate, whereas there was a reasonable likelihood that revealing it would have resulted in his acquittal. This concession alone suffices to require reversing Kelley's conviction. In any event, the only plausible explanation for the circuit court's remarkable insensitivity to the way in which disclosing the transcript might well have changed the outcome of the petitioner's trial would seem to be the narrow, "once a sullied witness, always a sullied

witness" lens, *see* Pet. App. 82a, through which the Eleventh Circuit looks at wrongly withheld evidence.[5]

11. That each crucial item of withheld evidence would not only support arguments already being advanced as to a witness's believability, but would add other arguments as well, *see* Pet. 21, makes this case an unusually good vehicle for considering the first Question Presented, because it frames the question in a context that shows the perversity of the rule that the more a key witness is sullied — and, thus, the closer the case — the less obligation prosecutors should feel to turn over exonerating evidence that would, among other things, impeach that witness further. What is more, the withholding of evidence in this case was sufficiently egregious and the circuit court's attempt to condone it sufficiently strained, that on the ultimate question — whether the conviction and death sentence in this case appear to be "worthy of confidence," *Kyles* v. *Whitley*, 514 U.S. 419, 434 (1995) — only a negative verdict seems possible.

12. Hoping to preserve from this Court's review the erroneous ruling in the court of appeals for which it offers, by way of justification, only a misleading apologia, the state also contends that the various federal circuits are uniform in their application of *Brady*. In order to demonstrate, to the contrary, just how far apart the circuits actually are in deciding matters like this one, the petition directly juxtaposed the rules effectively applied in the Eleventh Circuit and several others with those applied by the Ninth and D.C. Circuits, and

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[5] The circuit court also excused the failure to produce the transcript on the grounds that the state "apparently thought" that such a transcript had never even "been prepared," Pet. App. 83a; and in any event might not have had the transcript "in its possession," *ibid.* – despite the state's concession that it "had the transcript in its files" all along, Pet. App. 186a, and despite this Court's consistent holding that a *Brady* violation will be found "irrespective of the good faith or bad faith of the prosecution," *Brady*, 373 U.S. at 87.

showed that the instant case would have come out differently had it been heard in either of the latter.[6]

13. Stealthily shifting attention from its shabby argument that there is no split in the circuits by asserting that resolving the split would anyway be undesirable, the state accuses petitioner of advocating a "bright-line rule" that he neither urges nor attributes to any circuit. It is hard to take that accusation seriously, however, where the state confoundingly denies that the D.C. Circuit "adopted a bright-line rule," Resp. Br. 12, while treating petitioner's agreement with the approach of that circuit to these matters as the proposed adoption of just such a "bright-line rule for assessing the materiality of withheld impeachment information." *Id.* 22. The state further suggests that this approach would represent "a clear break with the totality of the circumstances review currently mandated" by *Brady*. *Ibid.* That is sheer nonsense.

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[6] The D.C. Circuit, for example, holds that "undisclosed impeachment evidence can be immaterial because of its cumulative nature only if the witness was already impeached at trial by the same kind of evidence." *United States* v. *Cuffie*, 80 F.3d 514, 518 (1996). The Second Circuit has announced a diametrically opposed view: "suppressed evidence is not material when it merely furnishes an additional basis on which to impeach a witness whose credibility has already been shown to be questionable." *United States* v. *Amiel*, 95 F.3d 135, 145 (CA2 1996) (emphasis added). *See generally* Pet. 16-19. The state tries to show that the circuits are all over the map rather than divided into two camps, see Resp. Pet. 16, but actually looking at the cases on which the state relies ends up reinforcing the conclusion that the division is exactly as the petition describes it. For although the state appears to show that a panel of the Second Circuit once erred by not recognizing its own rule, *see Boyette* v. *Lefevre*, 246 F.3d 76 (CA2 2001), in the other circuits the state cannot show a successful *Brady* claim where the undisclosed impeachment evidence would have been used to impeach a key witness whom the defense had *already* impeached at trial, *see United States* v. *Scheer*, 168 F.3d 445, 457 (CA11 1999) (witness never impeached at trial because prosecutor admitted witness' weakness); *Crivens* v. *Roth*, 172 F.3d 991 (CA7 1999); (witness never impeached at trial); *East* v. *Johnson*, 123 F.3d 235 (CA5 1997) (same).

14. No "bright-line" test is required in order to reject the idea that trial records merely present a hopeless miasma of factual nuance. Respondents suggest that, because "[t]he facts determinative of the ultimate conclusion on materiality are obviously going to be different in every case," an imposition by this Court of "a bright-line rule" would not be "a prudent answer to the materiality question." Resp. Br. 15. The irony will not escape this Court's attention that it is the Eleventh Circuit's approach, not the petitioner's, that applies a bright-line test for assessing the materiality of potential *Brady* violations. The circuits whose approach petitioner urges this Court to endorse in resolving the split eschew any bright-line rule;[7] but the opposite of such a bright-line rule, as the standard those circuits apply demonstrates, need not be a lawless mess. That this Court has felt compelled, in so many cases over the past half century and beyond, to address and refine what due process requires of prosecutors lends credence to the notion that standards can and must be developed to govern prosecutorial conduct and its review by the courts.[8]

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[7] Nor do they apply a rule so new as to preclude its retroactive application on habeas under *Teague* v. *Lane,* 489 U.S. 288 (1989). The state contends that the standard applied by the D.C. Circuit in *Smith* "is not a new rule at all," Resp. Br. 14, while simultaneously arguing that we seek application of a new rule of constitutional law, Resp. Br. 22, because Kelley "is seeking a rejection of *Brady*'s directive to reach a conclusion on materiality based on the totality of the circumstances," *id.* 23. We in fact contend just the opposite, that *Brady* material must be evaluated "in the *context of the case as a whole*," Pet. Br. 21 (emphasis added), a position that neither "breaks new ground" nor "imposes a new obligation." *Teague*, 489 U.S. at 301. Indeed, it was the Eleventh Circuit's evisceration of *Brady* scrutiny in the circumstances in which it is *most* called for that effected a change in the regime *Brady* demands.

[8] Respondent also suggests that the issue presented here will become less important as pre-AEDPA cases fade from the federal dockets. Resp. Br. 19. The contention ignores the obvious point that the circuit split will persist with respect to federal prosecutions; more disturbingly, it seems to imply that responsibility for providing the process due under the Constitution will evaporate with the federal habeas caseload.

15. That the state resists precisely the standards this Court's precedents demand in reviewing trial error is evidenced finally by its flippant willingness to excuse the circuit court for "not even purport[ing] to apply" the rules of *Kimmelman* v. *Morrison*, 477 U.S. 365 (1986), and *Wiggins* v. *Smith*, 539 U.S. 510 (2003), to Kelley's claim that his defense counsel failed to provide him with even minimally adequate representation. Resp. Br. 25. The court of appeals relied on, and the state urges, a frivolous non-exhaustion argument to meet petitioner's contention that his defense was fatally ineffective for its utter failure to investigate his claim of complete innocence.[9] The court of appeals acknowledged Kelley's argument before the state courts that his counsel "simply failed to investigate and thus failed to develop or use the tools that they had," Pet. App. 56a, but the state suggests that, by intensifying his focus before the habeas court on the particular investigator's conduct, Kelley somehow transformed his original claim about investigatory failure into an unrecognizable new claim about that same failure. Our petition demonstrates otherwise. *See* Pet. 26-30.

16. For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

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[9] The state questions whether Kelley suffered prejudice from counsel's lack of investigation into another suspect, Steve Busias. The state doubts whether counsel would have discovered one particular witness, Busias' son, who surprisingly, but by admission, was prepared to give testimony against his father, and who was, also by the state's admission, "available to testify." Pet. App. 199a. But any imaginable investigation into Busias would have involved interviewing such family members as his son about Busias' whereabouts during the murder. The state also suggests that the testimony of another potential witness would have been hearsay even if found, ignoring this Court's holding that "the hearsay rule may not be applied mechanistically to defeat the ends of justice," *Chambers* v. *Mississippi*, 410 U.S. 284, 302 (1973), and its suggestion that nondisclosure of even *concededly* inadmissible evidence could justify a retrial in a close case, *Wood* v. *Bartholomew*, 516 U.S. 1, 8 (1995) (per curiam).

Respectfully submitted,

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